

**Department of Personnel Administration**  
**Memorandum**  
**TO: Personnel Management Liaisons (PML)**

|   |                                      |
|---|--------------------------------------|
| <b>SUBJECT:</b><br>Family Medical Leave Act Changes | <b>REFERENCE NUMBER:</b><br>2010-009 |
| <b>DATE ISSUED:</b><br>03/02/10                     | <b>SUPERSEDES:</b>                   |

This memorandum should be forwarded to:

**Personnel Officers**  
**Labor Relations Officers**  
**Personnel Transactions Supervisors**

**FROM:** Department of Personnel Administration  
Labor Relations Division

**CONTACT:** Personnel Services Branch  
(916) 323-3343  
Fax: (916) 327-1886  
Email: [psb@dpa.ca.gov](mailto:psb@dpa.ca.gov)

Effective January 16, 2009, the federal Department of Labor (DOL) amended the Family Medical Leave Act (FMLA) regulations. This memorandum provides information on administering the amended FMLA regulations.

In addition, effective January 16, 2009, DOL adopted two new regulations to afford leave to military family members. The Department of Personnel Administration (DPA) has already issued PML 2009-028 dated June 15, 2009, that provided information on the new leave for military family members. On October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (NDAA 2010) amended the FMLA's military family leave entitlements. This memorandum also provides information on these new amendments.

**FMLA/CALIFORNIA FAMILY RIGHTS ACT (CFRA) INTERACTION**

CFRA is a State law that also provides for unpaid leaves of absence for family reasons or for the employee's own illness. Where the FMLA law and the CFRA law differ, the most generous/less restrictive leave provisions must be applied. **In reviewing amendments to the FMLA regulations DPA has adopted the most generous/less restrictive leave provision in coordination with the Fair Employment and Housing Commission (FEHC) which administers the CFRA.**

Note: FMLA and CFRA run concurrently except during Pregnancy Disability Leave (PDL), Qualifying Exigency Leave (QEL), and Military Caregiver Leave (MCL) if family member is not a covered under CFRA.

Example:

The amended DOL regulation 825.306(a)(3) allows an employer to ask for a diagnosis. CFRA regulation 7297.4(b)(2) however specifies that an employer **cannot** ask for a diagnosis, but it may be provided at the employee's option. Since CFRA is less restrictive, the department cannot ask an employee for a diagnosis under the amended FMLA regulation.

## **FMLA CHANGES (effective January 16, 2009)**

### **Employer Notice Requirements**

The amended regulations create three new employer and or employee notice responsibilities. (1) A mandatory General Notice published by the DOL for departments to use; (2) Notice of Eligibility and Rights and Responsibilities (DPA 752); and (3) Designation Notice (DPA 753). DPA has standardized DPA 752 and 753 as fill in and print forms. [DPA forms may be accessed on the DPA website.](#)

#### **1. General Notice**

DOL has published a new general notice poster. Departments must post the new notice entitled "Notice to Employees of Rights under the FMLA" (WH Publication 1420) at the worksite so it is visible to all employees and applicants. Each new employee must be given the information provided in the General Notice. A copy of DOL's General Notice prototype is available at the following DOL website:

<http://www.dol.gov/whd/fmla/finalrule/fmlaposter.pdf>

The General Notice must be accessible to employees by including it in an employee handbook or including all of the information contained in the General Notice in the department's own specific FMLA policy. Employers that post their handbook electronically meet the General Notice requirement only if it is accessible to all employees.

#### **2. ["Notice of Eligibility and Rights and Responsibilities" \(DPA 752\) | Word document fill-and-print version](#)**

A new form titled "Notice of Eligibility and Rights and Responsibilities" (DPA 752) is required to be given to the employee within five business days after the employer receives a request for FMLA/CFRA leave or becomes aware that the leave may qualify for FMLA/CFRA (previously the employer only had two days to notice employees). Departments may customize the DPA 752 as long as it includes, at a minimum, the same information specified in the form.

The “Notice of Eligibility and Rights and Responsibilities” (DPA 752) informs the employee whether or not they are eligible for FLMA/CFRA leave (i.e. worked at least 12 months with the employer and worked at least 1,250 hours in the previous 12 months). Eligibility does not mean the leave has been approved for FMLA/CFRA at this point. The form also provides important information regarding the employee’s FMLA/CFRA rights and responsibilities, information on medical certification requirements, and the consequences for not meeting those requirements, as well as information regarding the return-to-work release.

As a reminder, departments may require at least 30 days’ advance notice when the need for FMLA/CFRA is foreseeable. Foreseeable leave includes planned birth, adoption, foster care placement, or medical treatment. In the case of a serious health condition, if it is not possible to give such advance notice, the employee must submit the request as soon as possible.

3. [“Designation Notice” \(DPA 753\)](#) | [Word document fill-and-print version](#)

After the medical certification form (see below) is received, the new “Designation Notice” (DPA 753) informs the employee whether the FMLA/CFRA leave is approved. The department has five business days to inform the employee if the leave will be designated as FMLA/CFRA leave. If the leave is not designated as FMLA/CFRA, the department must state in writing the reason why the leave is denied. A return-to-work release may be required to return from leave if that is the department’s policy for returning employees to work after illness, injury, or disability.

The amended regulations clarified that only one Designation Notice is required for each FMLA/CFRA qualifying reason, per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis. A retroactive notice is permissible if it does not cause employee harm or injury.

Departments may not retroactively designate leave after the employee has returned to work.

## **Medical Certifications**

The FMLA regulations previously had one medical certification form and the changes now provide for two medical certification forms. The form is to be given to the employee at the same time as the Notice of Eligibility. They are titled (1) “Certification of Health Care Provider for Employee’s Serious Health Condition” (DPA 754); and (2) “Certification of Health Care Provider for Family Member’s Serious Health Condition” (DPA 755). The forms are completed by the employer, employee, and a health care provider.

If the employee is eligible for FMLA/CFRA leave, provide the employee with the “Certification of Health Care Provider for Employee’s Serious Health Condition” (DPA 754) or the “Certification of Health Care Provider for Family Member’s Serious Health Condition” (DPA 755). It is the

employee's responsibility to provide the department with the appropriate medical certification within 15 calendar days. The "Certification of Health Care Provider for Employee's Serious Health Condition" (DPA 754) and the "Certification of Health Care Provider for Family Member's Serious Health Condition" (DPA 755) are maintained as confidential documents.

If the form DPA 754/DPA 755 is incomplete or insufficient, the employer may request in writing to the employee what specific additional information is needed to make a determination for FMLA/CFRA leave.

The employer can ask for a second opinion for the employee's own health condition.

A Physician's Assistance is now an approved a health care provider.

## **OTHER FMLA REVISIONS**

The following are other revisions to the DOL FMLA regulations:

### **Employee Eligibility**

An employee is eligible for FMLA/CFRA leave when the employee has worked for an employer for a total of 12 months, even with a break in service. The employee must also have worked a total of 1,250 hours in the past year.

The regulations clarify the statutory requirement that employee eligibility determinations be made "as of the date leave commences." If an employee reaches the twelve-month eligibility requirement while on leave, the leave period prior to meeting the requirement is non-FMLA leave, and the leave period after the requirement is fulfilled is FMLA leave. The department clarified that periods of leave do not count towards the 1,250 hours requirement but they do count towards the twelve months of employment requirement.

Example:

An employee requests FMLA/CFRA leave but has only worked for the employer 11 months and does not meet the 12-month requirement for FMLA/CFRA. The FMLA/CFRA leave is denied. The employee is allowed to take a non-FMLA/CFRA leave. During the time taken for the non-FMLA/CFRA leave the employee meets the 12-month requirements for FMLA/CFRA eligibility and is now eligible for FMLA/CFRA leave. From that point forward the leave is FMLA/CFRA leave and is counted against the employee's FMLA/CFRA entitlement.

### **Intermittent or Reduced Scheduled Leave**

The regulations clarify that to calculate an employee's leave entitlement when an employee works a schedule that varies from week to week, employers are required to use a 12-month average of hours worked prior to the commencement of the employee's FMLA/CFRA leave.

## **Holidays**

The regulations clarify that when a holiday falls on a normal scheduled work week and the employee is taking a full week of leave, the holiday counts against the employee's 12-week FMLA/CFRA leave entitlement. If the employee is taking FMLA/CFRA leave in increments of less than a week, the holiday counts against the employee's FMLA/CFRA entitlement only if the employee was required to work on the holiday.

## **Return-to-Work**

The regulations provide that as a condition of an employee's return from medical leave, the employer may require the employee obtain a release to "return-to-work" from their health care provider stating they are able to resume work only if the employer has a uniformly applied practice or policy of requiring such release from other employees returning to work after illness, injury, or disability.

## **Light Duty**

If an employee accepts light duty work while recovering from a serious health condition, the period on light duty assignment will not be counted as FLMA/CFRA. Employees may not be required to work light duty jobs in lieu of taking leave, and those who do so voluntarily are not on FMLA/CFRA leave. At the end of the assignment, the employee has the right to be reinstated to the same or an equivalent position.

## **MILITARY FAMILY LEAVES (effective October 28, 2009)**

On October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (NDAA 2010) amended the FMLA's military family leave entitlements as described below. In addition, DPA has standardized two new fill in and print forms to use for military family leave: (1) "Certification of Qualifying Exigency for Military Family Leave" (DPA 756); and (2) "Certification for Serious Injury or Illness of Covered Servicemember for Military Family Caregiver Leave" (DPA 757).

## **Qualifying Exigency Leave (QEL)**

Previously employees were entitled to take up to 12 weeks of "qualifying exigency leave" in a 12-month period when a spouse, child, or parent in the National Guard or Reserves was called to active duty in support of a contingency operation pursuant to Title 10 of the United States Code. QEL allowed employees time off for reasons related to their family member's call to active duty. With the passage of NDAA 2010, the QEL is now available to employees who have family members serving in the regular Armed Forces. Also, the deployment no longer has to be in support of a contingency operation. Deployments to a foreign country are now covered.

## **Military Caregiver Leave (MCL)**

Previously employees were entitled to take up to 26 weeks of “military caregiver leave” during a single 12-month period to care for a spouse, child, parent, or next-of-kin who is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred while in the line of duty. The new law extends the ability of an employee to take MCL to care for a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. The veteran must have been a member of the Armed Forces (including the National Guard or Reserves) at any time within five (5) years preceding treatment of the serious injury or illness.

## **FORMS**

Departments should ensure their FMLA/CFRA forms meet the requirements of the new regulations either by using the new model DPA forms or ensuring that the department’s versions of the new forms contain the same information as the model DPA forms. The forms described in this PML are listed below and available at the following DPA links:

- [“Notice of Eligibility and Rights and Responsibilities” \(DPA 752\) | Word document fill-and-print version](#)
- [“Designation Notice” \(DPA 753\) | Word document fill-and-print version](#)
- [“Certification of Health Care Provider for Employee’s Serious Health Condition” \(DPA 754\) | Word document fill-and-print version](#). This new and improved form adds a section for essential functions of the job and adds a section for the health provider to put the actual time an employee may need intermittent leave.
- [“Certification of Health Care Provider for Family Member’s Serious Health Condition” \(DPA 755\) | Word document fill-and-print version](#).
- [“Certification of Qualifying Exigency for Military Family Leave” \(Family and Medical Leave Act\) \(DPA 756\) | Word document fill-and-print version](#)
- [“Certification for Serious Injury or Illness of Covered Servicemember for Military Caregiver Leave” \(DPA 757\) | Word document fill-and-print version](#)

## **ATTACHMENTS**

- [Questions and Answers – FMLA](#)
- [Comparison between New Family Medical Leave Act \(FMLA\) and California Family Rights Act \(CFRA\) Regulations](#)

/s/ Julie Chapman

Julie Chapman  
Chief Deputy Director of Policy